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No. 92-302

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

PETER BLAKE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether extrinsic evidence of petitioner's participation in a drug transaction should have been excluded under Rules 404(b) and 608(b), Fed. R. Evid.

2. Whether the prosecutor's cross-examination of petitioner about killings in Jamaica was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A24, B1-B13)[1] is reported at 941 F.2d 334.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1991. A petition for rehearing was denied on October 10, 1991. Pet. App. C1. The petition for a writ of certiorari was filed on January 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] The majority and dissenting opinions in the court of appeals are separately numbered in the appendix to the petition. For the convenience of the Court, we shall refer to the majority opinion as "Pet. App. A" and to the dissenting opinion as "Pet. App. B."

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted of using false identification to acquire a firearm, in violation of 18 U.S.C. 922(a)(6) (Count 1); possessing firearms while an illegal alien, in violation of 18 U.S.C. 922(g)(5) (Counts 2 and 7); possessing more than 50 grams of cocaine base with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 3); possessing an unregistered firearm, in violation of 26 U.S.C. 5861(d) (Count 4); and using a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Counts 5 and 6). The district court sentenced him to a total of 608 months' imprisonment, to be followed by a five-year period of supervised release. The court of appeals affirmed. Pet. App. A1-A24.

1. On March 25, 1989, petitioner purchased two firearms from a dealer at a trade show in Dallas, Texas. He completed the necessary firearms transaction forms using the false name "Winston Wilson." That purchase prompted a police investigation. On April 12, 1990, police officers arrested petitioner after a high speed automobile chase. While in custody after his arrest, petitioner spoke freely to police officers and confessed to numerous criminal offenses. Pet. App. A1-A2; Gov't C.A. Br. 3-4.

Among other things, petitioner told the officers his real name, admitted that he was an illegal alien, and said that he had lost $100,000 in a recent drug deal. Petitioner consented in writing to searches of the car involved in the chase and of two apartments. He also revealed the location of a key to one of the apartments, described the cache of weapons and ammunition he kept there, and disclosed a secret hiding place in the apartment where he had stashed cocaine base, a gun, and

money. Officers searched the apartment and found the weapons, ammunition, drugs, and money petitioner had described. Pet. App. A2-A3; Gov't C.A. Br. 4-5.

2. At trial, three police officers testified that petitioner had confessed to the conduct charged in the indictment and had told them about the apartment where the weapons, ammunition, drugs, and money were found. Pet. App. A6. Petitioner testified in his own defense. He denied telling the police about the apartment and, in response to the prosecutor's questions on cross-examination, he denied any involvement in drug trafficking. See *id.* at A8, A11. The prosecutor also asked petitioner whether he had ever killed anyone. Petitioner's counsel objected, and the district court held a bench conference at which the prosecutor represented that if the police were recalled, they would testify that petitioner had told them that he had murdered ten people in Jamaica. *Id.* at A11-A13. On the basis of that representation, the district court allowed the inquiry. Petitioner denied making the statement, and the government did not call any witnesses to rebut petitioner's denial. *Id.* at A13. See Gov't C.A. Br. 10-11. In its rebuttal case, the government introduced evidence that petitioner had been present at a drug transaction between an undercover officer and another individual, Kenneth Burke. Pet. App. A6.[2]

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[2] The evidence showed that in early April 1990, a Dallas police officer engaged in undercover negotiations to sell two kilograms of cocaine to two persons. The officer gave one of the persons, Kenneth Burke, cocaine in exchange for $52,000. Petitioner, the second person, was standing a few feet away at the time of the sale, watching the transaction. After the exchange, the police apprehended Burke, but petitioner escaped. Pet. App. A2; Gov't C.A. Br. 3.

3. A divided court of appeals affirmed petitioner's conviction. Pet. App. A1-A24. The court rejected petitioner's claim that Rules 404(b) and 608(b) of the Federal Rules of Evidence prohibited the prosecutor from introducing evidence of the Burke drug transaction in the government's rebuttal case. The court of appeals determined that the district court properly admitted the evidence, because it was relevant for a purpose other than demonstrating petitioner's character in order to show action in conformity therewith, Fed. R. Evid. 404(b), or attacking petitioner's general credibility, Fed. R. Evid. 608(b). As the court explained, the Burke transaction was relevant because petitioner was charged with using a firearm to facilitate drug transactions, he had admitted to the police officers that he was involved in drug trafficking, and his denial of drug trafficking at trial placed that matter at issue during the government's rebuttal. Pet. App. A6-A11.

The court also rejected petitioner's contention that the prosecutor's effort to impeach petitioner with two questions about killings in Jamaica required reversal of petitioner's conviction. Pet. App. A11-A20. The court found that although the questions were unfairly prejudicial and it was error to allow them, the error was harmless. *Id.* at A15-A20. The court determined that the evidence against petitioner was overwhelming, that no reasonable juror could have concluded that petitioner was a credible witness, and that the erroneously allowed questions did not affect any substantial right of petitioner's. *Id.* at A19-A20.[3]

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[3] The court of appeals also rejected petitioner's arguments that the district court erred when it did not sever certain counts of the indictment, that a mistrial should have been declared when a government witness stated that he worked for the "Jamaican Task

Judge Goldberg dissented. Pet. App. B1-B13. He concluded that petitioner's participation in the Burke transaction was collateral to the issues at trial and that petitioner's denial of involvement in drug trafficking, which the government elicited on cross-examination, did not convert petitioner's participation in the Burke transaction into a material issue. See *id.* at B3, B7, B9-B11. Judge Goldberg stated that he would have remanded the case for a new trial, because the erroneous admission of the extrinsic rebuttal evidence, coupled with the "inflammatory" questions about killings in Jamaica, "cannot be deemed harmless." *Id.* at B12.

ARGUMENT

1. Petitioner contends (Pet. 5-9) that the court of appeals erred in affirming the district court's admission of evidence that petitioner had participated in the Burke drug transaction. That evidence was relevant to the issues at trial, and neither Rule 404(b) nor Rule 608(b) prohibited its admission.

The Federal Rules of Evidence provide as a general matter that all relevant evidence is admissible. See Fed. R. Evid. 401-402. In this case, petitioner was charged with various offenses, including use of a firearm in relation to a drug trafficking crime. See 18 U.S.C. 924(c)(1). To prove that charge, the government called three police officers, who testified that petitioner had admitted involvement in drug trafficking and had directed the officers to an apartment where they found drugs, weapons, and money. Testifying in his own behalf, petitioner dis-

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Force" of the "Organized Crime Drug Enforcement Task Force," and that the evidence at trial was insufficient to support his conviction on three of the counts in the indictment. Pet. App. A5-A6, A20-A21, A21-A24.

puted the police officers' testimony and stated that he was not involved in drug trafficking. To rebut petitioner's testimony, the prosecutor properly introduced evidence of petitioner's involvement in the Burke drug transaction.

The evidence was relevant, because it had a tendency to make more probable a fact in issue at trial: whether petitioner was involved in drug trafficking. As the court of appeals explained, when petitioner denied an earlier admission to the police that he engaged in drug trafficking, he placed in issue the veracity of the officers' testimony about petitioner's admission. The government was entitled to present evidence showing petitioner's presence at the Burke drug transaction to corroborate the police officers' testimony and to establish petitioner's involvement in drug trafficking. Pet. App. A8. The government's evidence concerning the Burke drug transaction was particularly probative, because the evidence establishing petitioner's presence at that transaction was consistent with the police officers' testimony that petitioner had related losing a substantial amount of money in drug trafficking. See Gov't C.A. Br. 4.

Petitioner is mistaken in suggesting (Pet. 8-9) that Rule 404(b) prohibited the admission of evidence concerning the Burke drug transaction. Rule 404(b) forbids the use of extrinsic act evidence "to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The Rule does not prohibit the use of extrinsic act evidence for other purposes. In this case, the prosecutor introduced evidence of petitioner's involvement in the Burke transaction for the proper purpose of corroborating prior testimony that petitioner disputed, and not to show that petitioner had a bad character and therefore probably

committed the charged crimes. See Pet. App. A10-A11; see also *United States* v. *Smith Grading & Paving, Inc.*, 760 F.2d 527, 531 (4th Cir.), cert. denied, 474 U.S. 1005 (1985).[4]

Petitioner is also mistaken in suggesting (Pet. 5-7) that Rule 608(b) prohibited admission of evidence showing petitioner's involvement in the Burke drug transaction. Rule 608(b) generally prohibits the use of evidence of specific instances of a witness's conduct "for the purpose of attacking or supporting the witness' credibility." Fed. R. Evid. 608(b). That prohibition, however, is limited to attacks on the witness's general "character" for veracity. See Fed. R. Evid. 608(b) Advisory Committee Note, 28 U.S.C. at 758. As the court of appeals explained:

> The application of Rule 608(b) to exclude extrinsic evidence of a witness's conduct is limited to instances where the evidence is introduced to show a witness's general character for truthfulness.

United States v. *Opager*, 589 F.2d 799, 801 (5th Cir. 1979). Rule 608(b) is "inapplicable in determining the admissibility of relevant evidence introduced to contradict a witness's testimony as to a material issue. So long as otherwise competent, such evidence is admissible." 589 F.2d at 802. Thus, Rule 608(b) has no application here, where the government's extrinsic act evidence served as direct proof of a material fact at issue—petitioner's involvement in drug trafficking. Accord *United States* v.

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[4] Observing that the evidence was highly probative and corroborated matters already in evidence, the court of appeals correctly determined that Rule 403, Fed. R. Evid., would not provide a basis for excluding the evidence. Pet. App. A10-A11; see, *e.g.*, *United States* v. *Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920 (1979).

Cardenas, 895 F.2d 1338, 1345-1346 (11th Cir. 1990) (evidence of prior drug activity by defendant admissible to contradict his testimony of noninvolvement with drugs).[5]

2. Petitioner contends (Pet. 10-11) that the prosecutor's inquiry whether petitioner had killed persons in Jamaica warranted reversal. The court of appeals properly concluded, however, that the prosecutor's inquiry was harmless error. Pet. App. A15-A20. As that court explained, the evidence of petitioner's guilt on the charged offenses was "overwhelming." *Id.* at A19. Petitioner had freely admitted his guilt to police officers in post-arrest statements, and he directed the officers to an apartment where they found incriminating evidence. See *id.* at A2-A3, A6, A19. To contradict the police officers' statements and the physical evidence, petitioner relied on his own testimony. As the court of appeals explained,

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[5] See also *United States* v. *Farias-Farias*, 925 F.2d 805, 809-810 (5th Cir. 1991); *United States* v. *Garcia*, 900 F.2d 571, 575 (2d Cir.), cert. denied, 111 S. Ct. 169 (1990); *United States* v. *Qaoud*, 777 F.2d 1105, 1112 (6th Cir. 1985), cert. denied, 475 U.S. 1098 (1986); see generally 3 D. Louisell & C. Mueller, *Federal Evidence* § 307 (1979 & Supp. 1992); 3 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 608[05] (1992). Petitioner argues (Pet. 6-7) that extrinsic act evidence can never be used to impeach a defendant's statements on cross-examination, citing *United States* v. *Tarantino*, 846 F.2d 1384, 1409 n.8 (D.C. Cir.), cert. denied, 488 U.S. 867 (1988), and *United States* v. *Bosley*, 615 F.2d 1274, 1276-1277 (9th Cir. 1980). But even if those cases supported that dubious proposition, they would be of no aid to petitioner. The government was entitled to use evidence of petitioner's presence at the Burke drug transaction as direct proof of a material fact at issue—whether petitioner engaged in drug trafficking.

petitioner's own words thoroughly undermined his reliability as a witness. *Id.* at A17-A18.[6]

The court of appeals correctly concluded that no reasonable jury could have accepted petitioner's defense, that the objectionable questions did not affect the verdict, and that the prosecutor's improper inquiry accordingly was harmless error. See, *e.g.*, *United States* v. *Drummond*, 903 F.2d 1171, 1174 (8th Cir. 1990), cert. denied, 111 S. Ct. 759 (1991); *United States* v. *Neuroth*, 809 F.2d 339, 342 (6th Cir.), cert. denied, 482 U.S. 916 (1987); *United States* v. *Urbanik*, 801 F.2d 692, 698 (4th Cir. 1986); *United States* v. *Rodriguez*, 573 F.2d 330, 333 (5th Cir. 1978).

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[6] For example, petitioner admitted that he routinely used several aliases and employed false names and other misinformation to enter the United States illegally and to obtain driver's licenses unlawfully. He said that he had no knowledge of guns, but admitted that he had purchased two firearms on March 25, 1989. Petitioner claimed that when he bought the weapons he did not see the statement on the transaction form requiring truthful answers. He testified on cross-examination that, when purchasing a handgun, he thought he could permissibly use a false name, specify a false birthplace, and deny his status as an illegal alien. He said that he did not like guns and claimed that the name "Bullet," which was stenciled on his leather jacket, was not his nickname, yet he did not know either why or when the name was stenciled on his jacket. He explained his possession of $1,000 in cash at the time of his arrest as a payment he had received for finishing body work on a car, but he could not remember the owner of the car, its make, or where he had done the work. Pet. App. A17-A18.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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